PROPOSED REPORTER'S NOTES TO RULE 14

Rule 14(b)(2)(A)

This amendment responds to the Supreme Judicial Court's expansion of the *Blaisdell* procedure to analogous situations such as defenses based on an inability to form the requisite intent for an element of the crime, *see Commonwealth v. Diaz*, 431 Mass. 822, 829 (2000), on an inability to premeditate, *see Commonwealth v. Contos*, 435 Mass. 19, 24 n. 7 (2001), and where the defendant places at issue his or her mental ability voluntarily to waive *Miranda* rights, *see Commonwealth v. Ostrander*, 441 Mass. 344, 352 (2004). In addition, the Court has indicated in *dicta* that the same would hold true in the case of a defense based on battered woman syndrome, *see Ostrander*, 441 Mass. at 355. .

There are two different dimensions to the problem that this subsection addresses. One concerns giving notice to the Commonwealth of a complex issue that the prosecutor otherwise would have no reason to expect to litigate. The other deals with redressing the unfairness of allowing a defense expert to testify based on statements obtained from the defendant without giving the prosecution an opportunity to obtain equivalent access for its expert.

The proposed amendment addresses the first concern by expanding the scope of the notice provision beyond the context of *Blaisdell* to include all mental health defenses. A mental health defense is one that places in issue the defendant's mental condition at the time of the alleged crime, based on a claim that some mental disease or defect or psychological impairment, such as battered woman syndrome, affected the defendant's cognitive ability. These are complex issues for which the prosecutor should have time to prepare, whether an expert testifies for the defense or not. As used in this subsection, the term "mental health defense" does not include a claim that the defendant's cognitive ability was affected by intoxication, an issue that arises more frequently and does not present the same level of complexity as do the former examples.

The proposed amendment addresses the second concern by requiring notice whenever the defendant intends to rely on expert testimony concerning the defendant's mental condition at any stage of the process on any issue, whether it relates to culpability, competency or because it concerns the admission of evidence. Thus, for example, if the defendant intends to introduce expert testimony in support of a claim that a confession was not voluntary, as in *Ostrander*, the notice would specify that the witness would testify as to the defendant's mental condition at the time of the confession. If it appears that the expert will rely on statements of the defendant as to his or her mental condition, then the judge may order the defendant to submit to an examination pursuant to subsection 14(b)(2)(B).

Rule 14(b)(2)(B)(iii)

The Rule applies not only to experts who are psychiatrists, but to psychologists as well.

The regime for disclosure of expert reports has been amended in light of *Commonwealth v. Sliech-Brodeur*, 457 Mass. 300 (2010). The timing of the release of the Commonwealth's

expert's report was altered only to make clear that the parties can agree on its disclosure at a time earlier than previously set out in the Rule. *See Sliech-Brodeur*, 457 Mass. at 325 n. 34. As required by *Sliech-Brodeur*, defense experts as well as the prosecution's must prepare and disclose reports. In order to avoid infringing on the defendant's privilege against self incrimination, the defense expert's report is released to the prosecution at the same time that the defendant receives the report of the Commonwealth's expert. The Rule also has been amended to address the timing of the exchange of reports. The latest date of exchange would be when the defendant expresses a "clear intent" to rely on mental impairment as an issue in the case, relying in part on the defendant's statements or testimony. This will often occur at the final pretrial conference or comparable event. The Rule attempts to avoid the delay and inconvenience of disclosing the reports only after the defendant's expert offers testimony on direct examination.

Once the reports have been released to the parties, they may be shared with the respective experts for each side.

The Rule has been amended to require more detail in the content of the report that both prosecution and defense experts must file. This portion of the Rule is patterned after 18 U.S.C. § 4247(c). In one major respect, however, the Rule goes beyond the federal model by requiring the report to contain a complete account of the statements of the defendant that are relevant to the issue of his or her mental condition. This includes both statements relating to the underlying incident as well as any statements prior to or following it that are relevant to the defendant's mental condition. If the examiner considered written statements of the defendant, the report should contain the relevant portions. If the examiner considered oral statements of the defendant, the report should include the substance of what the defendant said that bears on the question of his or her mental condition.

The protection of the work product doctrine and the principle that notes or preliminary drafts are not discoverable if they are incorporated into a final report, applicable elsewhere in the discovery regime that Rule 14 establishes, apply as well in this context.

Rule 14(b)(2)(C)

This provision gives trial judges the flexibility to require the parties to provide additional discovery beyond the information contained in the notice that the defendant must give and the reports that the experts must file. It is a very limited grant of discretion and should be reserved for cases presenting discovery issues that are out of the ordinary. In this respect, it is more restrictive than the analogous discovery provision in Rule 14(a)(2).